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IN THE

# Supreme Court of the United States

October Term, 1959.
No. 282

ALBERT N SHAHADI and JOSEPHINE SHAHADI, his wife,

*Petitioners.*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on April 16, 1959, in respect to which judgments a timely petition for rehearing was denied on May 11, 1959.

## OPINIONS BELOW.

The opinion of the Tax Court of the United States is reported at 29 T. C. No. 122.

The opinion announced by the Court of Appeals on April 16, 1959, is reported at 226 F. 2nd 495 (App. p. 25).

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## JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was made and entered on April 16, 1959 (App. p. 36). A timely petition for rehearing was filed and was denied on May 11, 1959.

Jurisdiction of this Court is involved under 28 U. S. C. Sec. 1254(1).

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## QUESTIONS INVOLVED.

1. Did the Court below in its opinion create a conflict in its failure to properly apply Rule 52(a) of the Federal Rules of Civil Procedure and thereby violate the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Did the Court below in its opinion create a conflict with this Court in that it misinterpreted the language of this Court's opinion in the case of *United States v. Massei*, 355 U. S. 595?

3. Did the Court below violate the wife-petitioner's rights under the due process clause of the Fifth Amendment to

the Constitution in charging her with a fraud penalty for year 1950 because she joined in the execution of her husband's income tax return and where there is an absence of proof of fraud as to her?

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## STATUTES, CONSTITUTIONAL AMENDMENTS AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

5th Amendment to the Constitution of the United States.

The 5th Amendment to the Constitution of the United States provides as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property to be taken for public use, without just compensation."

Federal Rule of Civil Procedure 52(a) reads as follows:

> "Effect. 'In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.
>
> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses' * * * "

Sec. 1112—Burden of Proof in Fraud Cases.

In any proceedings involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner. 26 U. S. C. 1952 ed., Sec. 1112.

Section 51 (b) of the Internal Revenue Code of 1939 reads as follows:

Individual Returns * * * "(b) Husband and wife.—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income and the liability with respect to tax shall be joint and several. No joint return may be made if either the husband or wife is a non-resident alien."

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## STATEMENT OF THE CASE.

The Tax Court determined tax and fraud penalty deficiencies against petitioner, Albert N. Shahadi, of Atlantic City, New Jersey, for the years 1944 through 1949, and upon Albert N. Shahadi and his wife, Josephine, for the year 1950, in the total amount of $74,536.45.

The deficiencies are based upon a determination of unreported income by the net-worth method in the total amount of $102,277.74. The net-worth schedule was stipulated with two exceptions; one as to the opening cash on hand, and the other; an item of jewelry and furs, in each of the taxable years.

The net-worth schedule allows the petitioners opening cash of $506.33 as of December 31, 1943, which was in a

bank checking account, but nothing for cash currency claimed by Mr. Shahadi. He claims he had cash on hand of $70,000 consisting of a gift of $30,000 from his mother in late December 1924 or early January 1925, a gift of $20,000 from his father in 1931, and $20,000 in earnings, gifts and inheritances. The petitioners claim that the jewelry and furs included in the net worth were not purchased by Albert N. Shahadi, but most pieces were gifts to his wife Josephine by her mother and other pieces were purchased by his wife.

Petitioners are husband and wife, having been married in 1950, and reside in Atlantic City, New Jersey. Petitioner's, Albert N. Shahadi, income tax returns for years 1944, 1945, 1946, 1947, 1948 and 1949, and his wife's, Josephine, joint income tax returns for 1950, are claimed by the Commissioner of Internal Revenue, respondent, to be incorrect and false and fraudulent returns based upon a net worth approach by his agents.

As a result respondent issued 90-day letters to petitioners, assessed tax deficiencies, fraud penalties and underestimate penalties for each of the years involved and also an underestimate penalty for 1951.

In due course petitioners appealed all of said assessments and penalties to the Tax Court.

These cases were heard as a consolidated group by Judge Stephen E. Rice in Philadelphia, Pennsylvania, commencing Monday, December 3, 1956. After the trial of these matters and after briefs had been filed and before any findings of fact had been made and an opinion written and filed by Judge Rice, he died on February 9, 1958. The cases, not being disposed of, were re-assigned to Judge Ernest H. Van Fossan.

Judge Van Fossan, on March 24, 1958, filed his Findings of Fact and Opinion in said matters and found against petitioners.

On April 22, 1958, petitioners filed a motion for reconsideration, review and revision of opinion by the Tax Court. The Court denied this petition on April 25, 1958.

On July 31, 1958, Judge Van Fossan filed his Decisions Under Rule 50 in the consolidated actions.

On September 25, 1958, the petitioners filed their petition for review by the United States Court of Appeals for the Third Circuit.

The consolidated record of the three cases prepared by the Tax Court was filed and docketed in the Court of Appeals on December 23, 1958. That Court then allowed on motion consolidation of cases for purposes of brief, appendix and argument.

The United States Court of Appeals after argument had filed its opinion on April 16, 1959, affirming the Tax Court's decision. A timely petition for rehearing was filed with the Court which was denied without an opinion.

Albert N. Shahadi (hereinafter referred to as the petitioner) resided in Atlantic City, New Jersey, during all the years involved. For the years 1944 through 1949 he filed an individual Federal income tax return. For the years 1950 and 1951 he filed a joint return with his wife, Josephine Shahadi, whom he married in 1950. All of said returns were filed with the Collector of Internal Revenue for the First Collection District of New Jersey.

Petitioner was born in Lebanon, Syria, in 1895, the only child of Nicola and Mary Shahadi. In 1898 they emigrated to the United States accompanied by Mrs. Mary Shahadi's sister and brother-in-law and their family, Saseen by name. The Saseen family was composed of two adults and six children, one of them being Alfred Saseen. All of the Shahadis are American citizens by naturalization.

Petitioner is an attorney-at-law, duly licensed to practice in the State of New Jersey. After graduating from Dickinson Law School in 1922, he served a brief clerkship with a law firm as required by New Jersey State Law. He passed the State's Bar Examination in 1923, and entered the law offices of Joseph Perskie (later a Justice of the Supreme Court of New Jersey) at a salary of $25.00 to $50.00 per week, plus earnings from his own cases. He remained in

that office until about 1928, when he entered practice for himself.

From the beginning of his career in 1922 petitioner was interested in politics. In 1937 he was appointed a probate clerk in the office of the Surrogate of Atlantic County, a position in which he served for approximately one year. In 1938 he became Recorder, or Municipal Court Judge, of Atlantic City. He held that office until 1944, when he was elected a City Commissioner of Atlantic City. In 1950 he was appointed to the position of County Solicitor, Atlantic City, New Jersey, an office which he held through the latter years in issue and still holds. Set forth following are the earnings petitioner received in each of the aforementioned positions:

| Year | Position | Salary Earnings |
|---|---|---|
| 1938 | Recorder | $2080.00 |
| 1939 | Recorder | 4260.00 |
| 1940 | Recorder | 4500.00 |
| 1941 | Recorder | 4500.00 |
| 1942 | Recorder | 4574.88 |
| 1943 | Recorder | 4699.84 |
| 1944 | Recorder and Commissioner | 5006.19 |
| 1945 | Commissioner | 5250.00 |
| 1946 | Commissioner | 5250.00 |
| 1947 | Commissioner | 5250.00 |
| 1948 | Commissioner | 5250.00 |
| 1949 | Commissioner | 5250.00 |
| 1950 | Commissioner | 1312.50 |
| 1950 | County Solicitor | 5312.00 |
| 1951 | County Solicitor | 7900.00 |

Petitioner did not have to return his public office income until 1939.

During the years in issue, while holding the public offices above indicated, petitioner was permitted, and did, conduct

his own law practice in privately maintained law offices. Throughout this period he was associated with an attorney named Harry Miller. Petitioner's practice was composed mostly of representation of insurance companies and it was agreed between him and Mr. Miller, that Mr. Miller would do the trial work for petitioner in the insurance cases in consideration for which he would receive a portion of petitioner's fee. Upon receipt of a particular fee petitioner would pay Mr. Miller his share and then record in his books and report as income only the returned net fee.

When first contacted by the respondent's internal revenue agents in August of 1951, petitioner had no books or records with respect to income realized and expenditures made in the years through 1948, except certain retained checks for the year 1948. For the years 1949, 1950 and 1951, petitioner had a form which he kept for these three years and for prior years and all ledger sheets and cancelled checks which contained a complete record of all his income and expense items for those three years.

All during the petitioner's private practice of law to 1951 he moved on four different occasions and instead of carting his records and moving them along with him, and feeling that he had held them long enough, he personally destroyed the checks and ledger sheets. He thought he would never have any further use for them.

Originally, petitioner had offices in the Guaranty Trust Building and then moved from there to the Schwehm Building and then in the Schwehm Building he moved on two occasions from one floor to another. He finally moved back to the Guaranty Trust Building, where he is still located. The petitioner's books and records were kept by Mrs. Irene Bronstein, his secretary, who had charge of the ledger. She used a loose-leaf ledger and wrote in all the fees that were taken in and all the disbursements pertaining to the operation of the law office. Nine-tenths of petitioner's time was occupied with official public business. All of petitioner's fees from his insurance company clients were paid

by check. The same kind of records kept by the petitioner in 1949, 1950 and 1951, were also kept by him in the prior years, 1944 to 1949.

The petitioner's income tax returns for the years 1944 to 1951, inclusive, were prepared by Mrs. Bronstein from all the entries in the petitioner's records. Petitioner had copies of his income tax returns from 1937 to 1951 which he turned over to the respondent's agents. He gave them everything for which they asked including 300 to 400 private files of his private practice that were available.

Petitioner has had no tax practice background and has never prepared income tax returns and depended upon his secretary to prepare proper returns.

None of the investigating agents ever interviewed Mrs. Bronstein although they knew of her.

Respondent claims that a preliminary examination of petitioner's books and records for the years 1949 and 1950 by his revenue agents disclosed that they failed to reflect substantial cash expenditures made during that period; and an analysis of petitioner's bank deposits for the years 1946 through 1948 revealed deposits exceeded reported gross income. That petitioner when confronted with that information explained that perhaps his forwarding fee arrangement with Mr. Miller might account for the discrepancy. Mr. Miller's records, according to the revenue agents, shed no light on the amount of income he had received from Mr. Shahadi.

As a result, the net worth and expenditures method of reconstructing income was resorted to by respondent's agents to recompute the petitioner's income and taxes.

Subject to the exceptions and reservations hereinafter noted, the parties entered into a stipulation for trial, with respect to petitioners' assets, liabilities, living expenses, net worth and annual increase in net worth plus living expenses, as of December 31, 1943, and as of December 31 of each of the taxable years 1944 through 1950. Respondent only allowed $506.33 as cash on hand (in bank) as of De-

cember 31, 1943, but did not allow any of petitioners' claimed $70,000.00 cash currency on hand at that time.

With respect to the net worth schedule, the petitioners reserved the right to submit evidence concerning the amount of cash on hand as of December 3, 1943, and throughout each of the years involved in this proceeding. They further reserved the right to submit evidence with respect to the item of "Jewelry and Furs," appearing in the schedule of assets, more particularly with respect to the value of such assets, the source of the amounts expended during the taxable years for such assets, and the effect of such expenditures on their income.

The value of the furs appear in the net worth statement as follows:

| 12-31-44 | 12-31-45 | 12-31-46 | 12-31-47 | 12-31-48 | 12-31-49 |
|---|---|---|---|---|---|
| $2010.00 | $2010.00 | $2010.00 | $7530.00 | $7530.00 | $11530.00 |

| 12-31-50 |
|---|
| $12825.00 |

When contacted by the respondent's agents in 1951, petitioner informed them at various times that he had cash currency of approximately $70,000.00, more or less, as of December 31, 1943, and used it up in the following years. That he had received as gifts $30,000.00 from his mother, Mary Shahadi, in late December of 1925 or in early January 1926; $20,000.00 from his father, at the end of 1931, and $20,000.00 from savings and other gifts from his parents; that he had kept the cash in a safe deposit box in the bank and used it over the years involved.

In 1898 the Shahadi family emigrated to the United States. Upon their arrival in New York City, Mary and Nicola Shahadi began peddling imported linens and laces from house to house, securing their stock from relatives in New York. They worked very long hours. After two or

three years the Shahadis moved to Philadelphia, where they continued their door-to-door selling, mostly on the "Main Line" and again putting in long hours of labor. The Shahadis spent the summer of 1905 at Atlantic City, New Jersey, upon advice that the air might be beneficial to Mary's failing health. They rented a small house for living quarters, and also a small store on the Boardwalk from which they continued to sell expensive imported linens and laces from Italy, France, Switzerland, Belgium, Syria and Ireland.

As a result of Mary's improvement in health they settled permanently in Atlantic City in 1906. At that time Nicola rented a vacant lot adjacent to the Boardwalk upon which he constructed a two-story building of corrugated metal. The first floor was used as a store from which the Shahadis sold their fine linens and related products. The upper floor was utilized for living quarters. After three or four years at that location the Shahadis moved their building from the property in order to make way for a group of row stores the owners were erecting thereon. After completion of the stores, one, at 519 Boardwalk, was rented to the Shahadis. It was approximately 20 feet wide and 75 feet deep, and was divided in half by the Shahadis. They conducted their business in the front portion of the structure and maintained their living quarters in the rear. They kept their most important pieces of merchandise and cash in a large Mosler safe located in the store. They remained at the 519 Boardwalk location until about 1926. They kept only a small checking account to pay normal household bills.

When the Shahadi family first came to the United States they were accompanied by Mary's sister and brother-in-law and their family, Saseen, by name. The Saseen family was composed of two adults and six children. After the Shahadis had been located in Atlantic City for a few years Saseen deserted his family, leaving them destitute. Thereupon, Mary Shahadi undertook the support of the seven members of the Saseen family which she continued at least

through 1920. In 1914 Nicola returned to Europe for a visit where he was caught up in World War I and interned. He remained there until 1920, when he returned to the United States. During that period Mary supported Nicola by sending him money through the American Express Company and the Red Cross.

In 1916 petitioner entered Syracuse University in Syracuse, New York, where he remained approximately one and a half years. Alfred Saseen, petitioner's cousin, entered the University at the same time, remaining there at least two years. Throughout this period Mary Shahadi paid all the expenses incurred by petitioner and her nephew, Alfred. Petitioner served in the United States Army in 1918 and was honorably discharged therefrom.

On May 11, 1923, Mary Shahadi purchased a house located at 113 N. Richmond Avenue in Atlantic City for an approximate purchase price of $10,000.00. At the time of its purchase the property was subject to a $4000.00 mortgage, bearing interest at 6 per cent per annum, held by the Islanders Building and Loan Association of Atlantic City. Mary Shahadi undertook payment of that outstanding indebtedness in the following manner: she was required to pay for 20 shares of the Association's stock, costing $200.00 per share, at the rate of $1.00 per share per month. Those shares drew some dividends based on the Association's earnings. When the shares were paid in full the mortgage was to be cancelled. Until that time the mortgage drew interest at 6 per cent on the entire $4000.00, or $20.00 per month, irrespective of the amount still due on the shares. In addition, a monthly premium of 10 cents per $100.00 of loan was charged, which amounted to a liability of $4.00 per month. Thus, the total Shahadi payment was $44.00 per month from the date of purchase until the mortgage was released on or about April 6, 1933.

At some time in or about 1926 the Shahadis moved their shop and safe from 519 Boardwalk to 831 Boardwalk. The new store structure was approximately 18 feet in width and

35 feet deep. The Shahadis continued to keep their cash and expensive pieces of merchandise in their Mosler safe. They kept a large inventory and were considered the largest business of its kind in that area. The family remained here until after March of 1927.

On July 17, 1926, Nicola Shahadi, as principal, and the petitioner, as surety, executed a replevin bond in favor of the sheriff of Atlantic County, New Jersey, in the principal amount of $1,800. That bond was executed to replevy certain goods in connection with an action brought by Nicola Shahadi against the States Avenue Realty Company. The goods covered by the bond were:

> * * *. 2 floor show cases, 5 tables, 2 counters, 1 glass door show wall case, 1 desk, 98 kimonas in back cases, 50 tapestry runners and mats, 50 kimonas in rack, about 30 shawls in case and on walls, about 50 sets table cloths, about 100 scarfs, 1 cash register, 25 pillows, about 200 lace doilies and baby clothes, 2 dozen table cloths, 4 dozen handkerchiefs, 8 dozen night gowns, 400 doilies, laces, etc., 500 pieces handkerchiefs, doilies, etc., and all other goods on premises, * * *.

In 1926, under applicable New Jersey law, the sheriff was directed, before delivering any goods under a writ of replevin, to take in his own name from the plaintiff a bond in double the amount of the goods described in the writ.

On February 28, 1927, it appears, petitioner, in order to secure a loan of $5,000, mortgaged certain property in the Chelsea Safe Deposit and Trust Company. Petitioner has no recollection of making such a loan, however. The property consisted of certain unimproved lots located in the Venice Park area of Atlantic City, which he acquired free of encumbrances on March 4, 1925. By its terms the mortgage drew interest at 6 per cent per annum, and matured in 4 months. On March 19, 1929, the mortgage was assigned to the Bankers Trust Company, which held it until November 25, 1933, when it was assigned to petitioner. On

December 20, 1927, the Venice Park property was sold to John C. Herrman, a local investor in delinquent tax property, for the sum of $71. That figure represented unpaid 1926 taxes in the amount of $61.50, interest of $6.50, and costs of $3. Petitioner redeemed the property from Herrman on February 27, 1928, upon payment of $91.95.

On March 18, 1927, Mary Shahadi died. The petition for probate and letters testamentary, filed on behalf of her estate by the petitioner as executor, disclosed she died possessed of personal property in the amount of $300, and real property valued at $4,000. By will dated June 15, 1925, after directing her debts and funeral expenses first be satisfied, she devised and bequeathed the residue of her estate to the petitioner. At the time of her death petitioner acquired title to the 113 N. Richmond property, where he and Nicola continued to maintain their home.

Sometime after Mary's death Nicola moved his shop from 831 Boardwalk to the Hotel Traymore. On or about April 6, 1929, Nicola Shahadi borrowed the full cash surrender value of $725 on a $5,000 life insurance policy which he owned. At some time prior to April 15, 1929, Nicola also borrowed $1,800 from the Boardwalk National Bank on a note due April 22, 1929, on which petitioner's name appeared as an endorser. On April 15, 1929, Nicola Shahadi filed a petition in bankruptcy in the United States District Court for the District of New Jersey. The aforementioned $1,800 note appeared as a liability in the petition filed by him. As of April 15, 1929, he listed cash assets of $2.39 in the Chelsea Safe Deposit and Trust Company, and $22.43 in the Boardwalk National Bank. Unsecured debts were listed at $27,542.21 and appraised value of stock in trade $564.05. Petitioner was also responsible on a lease with a monthly rental of $1083.00 which still had two years to run.

After his discharge from bankruptcy in or about August of 1929, Nicola rented a shop located about 2233 Boardwalk, where he continued the same type of business. From there he moved his store to the 3100 block of the Board-

walk. Nicola kept his cash in a safe at home in his bedroom. In September of 1931, the adjoining shop caught fire; the fire spread and partially consumed the Shahadi store. Because of the damage to his shop, Nicola received fire insurance proceeds in the amount of $4,700, which he deposited in his account with the Guaranty Trust Company. As a result of financial difficulties, Guaranty Trust issued its stock to Nicola Shahadi representing the monies in his account. This stock was ultimately endorsed over to the petitioner in 1940. At the end of 1931 Nicola Shahadi went out of business. Thereafter, he lived with the petitioner until his death. In each of the years 1937 through 1947 petitioner claimed Nicola as a dependent on his income tax returns. Petitioner's father in 1930 and 1931 also had profitable stores in Ocean City, New Jersey, and on Chestnut Street in Philadelphia. At the end of 1931 Nicola closed up his business and gave petitioner $20,000 in cash, with the understanding his son Albert would keep him for the rest of his life, which Albert did.

Nicola Shahadi died on November 3, 1947. Sometime thereafter petitioner, as a beneficiary of certain life insurance on his father's life, received insurance proceeds of about $5,100. Petitioner, as executor, filed a resident return on behalf of Nicola's estate with the Transfer Inheritance Tax Bureau of the New Jersey Department of Taxation and Finance. In that document, in response to an inquiry as to whether the decedent had made any transfers of a material part of his estate more than two years prior to death without full consideration, the petitioner answered "No". Nicola Shahadi's estate was declared "untaxable".

A search of the files of the office of the District Director of Internal Revenue at Camden, New Jersey, revealed no record of income tax returns having been filed by Mary Shahadi for the years 1913 through 1927, nor by Nicola Shahadi for any year during the period 1913 through 1926, the year 1929, and the years 1931 through 1947.

Petitioner is an attorney at law, duly licensed to practice

in the State of New Jersey. After graduating from law school in 1922 he served a brief clerkship with a law firm, as required by state law. He passed the state bar examination in 1923, and entered the law offices of Joseph Perskie at a salary of $25 to $50 per week. He remained in that office until about 1928, when he entered practice for himself.

From the time of his mother's death in 1927, until 1944 petitioner held title to the 113 N. Richmond Avenue property. The tax records of Atlantic City disclose that he was delinquent in the payment of local realty taxes during 1928, 1930, 1931, 1932, and 1935 through 1937. In August of 1937 petitioner acquired certain property located at the corner of Grant and Arkansas Avenues, Atlantic City. At the time of its acquisition, the property was tax delinquent for the years 1930 through 1936. Because of that delinquency it had been transferred to the Tax Title Lien Register by the Atlantic City Tax Collector. After acquiring the property it appears the petitioner became delinquent in the payment of taxes for the years 1937 through 1940, and these years were also transferred to the lien register. Commencing in 1937 and continuing through August of 1941, petitioner made small payments of principal and interest until the delinquencies for 1930 through 1936 had been satisfied. On August 18, 1941, petitioner discharged in full the delinquencies for the years 1937 through 1940.

On January 17, 1944, petitioner purchased bonds and stock of the Atlantic City Racing Association in the amount of $5,500. To make up the purchase price he borrowed $3,500 from the Guarantee Bank and Trust Company on January 17, 1944. The balance of $2,000 he drew from his own account. He issued his check in the amount of $5,500, payable that same day. In February 1944 petitioner redeemed all his outstanding United States Savings Bonds, receiving $4,001.75. He used this money to pay off the $3,500 loan. One of the bonds redeemed, in the face amount of $1,000, had been issued in July 1943. On January 12,

1945, petitioner paid $8,250 in cash on a subscription of Atlantic City Race Track bonds.

On November 24, 1948, petitioner purchased a home located at 131 S. Delancey Place, Atlantic City, jointly with Josephine Carson, with whom he contemplated marriage, for a total purchase price of $28,000. A portion of that sum was paid by check, a portion paid in cash, and the balance satisfied by a $15,000 mortgage.

Petitioner was indicted on March 8, 1954, for Federal Income Tax Evasion for the years 1947, 1948 and 1949. Trial was held in the United States District Court for the District of New Jersey in about January of 1955. A jury verdict of "acquittal" was returned on all counts. In the course of that trial petitioner claimed receipt of two gifts from his parents—one of $30,000 from his mother and one of $20,000 from his father.

Josephine Shahadi, petitioner, testified that all the furs and jewelry at issue in the net worth statement belonged to her, her mother and her daughter. That many years back her mother had a collection of fur coats and diamonds and she, petitioner, used to borrow and wear them. That eventually her mother gave her various pieces of the items over the years. She further testified that petitioner, Albert N. Shahadi, never bought any of those articles, nor did he ever own any of them. Also, that as to some of the fur pieces she purchased herself and her cancelled checks were produced in evidence as showing payment of same.

The Shahadis' stores contained large amounts of highly valuable merchandise and they were not just "small shop keepers". Nicola Shahadi paid over $1000 per month rent for his store.

Petitioner, Albert N. Shahadi, did not have to support himself until after his mother died in 1927. He lived at home, rent and food and clothing free, and was often given sums of money by his mother. Neither did he pay rent for his offices while he was with Mr. Perskie; and in 1937 and 1938 his salary from public office was free of Federal income taxes.

Petitioner supported his father from 1931, from the time he was given the $20,000 until his father's death.

The respondent does not know whether or not respondent had the sum of $8250.00 in cash, which he used on January 12, 1945, to subscribe for race track stock, as of the end of 1944. He doesn't have a starting point at the end of 1944. He doesn't have any definite proof he didn't have it. The respondent's agents, after a long, thorough investigation of petitioner did not and could not find any other taxable source of income of his, other than those shown on his income tax returns. Harry Miller reported what moneys he received from petitioner on his tax returns. The petitioner gave complete co-operation to the respondent's agents in their investigation of him. Nicola and Mary Shahadi were frugal and saving persons and were never extravagant.

Petitioner put his cash and kept it in a safe deposit box in a bank because the banks had been shaken-up before that time; and on account of his being in politics. That a checking account would show money and would be a headache and a heartache. Because as soon as one, who is in or near the top in politics, is ascertained to have money he is requested by others to make loans to and sign notes for them; and in many instances, if it is done, the money is not paid back. That in Atlantic City it is and was not hard to discover what a depositor had on deposit in the local banks.

## REASONS FOR GRANTING THE WRIT.

The writ of certiorari should be granted because the decision of the United States Court of Appeals for the Third Circuit sought be reviewed,

1. raises important questions as to the proper application of the Federal Rules of Civil Procedure.

2. is in conflict with the principle of this Court's decision in *United States v. Yellow Cab Company*, 338 U. S. 338-344, as to the scope of Rule 52(a).

3. is in conflict with the decision of other Federal Courts as to the scope of Rule 52(a). *Seagrave Corp. v. Mount*, 212 F. 2nd 389.

4. interprets Rule 52(a) of the Federal Rules of Civil Procedure in conflict with the due process clause of the Fifth Amendment to the Constitution of the United States.

5. is in conflict with this Court's decision as to the requirements for proof of fraud in a net worth expenditures income tax case and misinterprets this Court's decision as to the same in *United States v. Massei*, 355 U. S. 595.

6. is in conflict with the due process clause of the Fifth Amendment to the Constitution of the United States particularly as to the holding of fraud against the wife petitioner because she had signed a joint income tax return with her husband petitioner for year 1950.

7. has erroneously decided a question of Federal law and Constitutional law which has not been, but should be, settled by this Court to effect an orderly administration of justice.

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## ARGUMENT

### A. Argument amplifying reasons 1, 2, 3, 4, 5 and 7 relied on for the allowance of the writ.

The United States Court of Appeals for the Third Circuit has rendered a decision in this case which is in direct con-

flict with Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) clearly states that a Court is bound to give due regard to the opportunity of the trial court to judge of the credibility of the witnesses respecting findings of fact. Therefore, correct legal reasoning should be that when a trial judge does not have the opportunity to judge of the credibility of the witnesses because he did not see or hear them but only wrote a decision from a cold record, as in this case, his findings of fact in said decision can, and should be set aside by an appellate Court, particularly when the appellate Court concedes that more than one conclusion could have been drawn from the facts.

This Court has enunciated the law to be, that findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.* In this case the Court of Appeals for the Third Circuit by its decision is in conflict with this Court in that the question of fraud in a tax case is governed entirely by intent and it should have reversed the findings of the Tax Court as to fraud and granted a new trial or should have made findings of fact de novo, because the findings of fact that were made by the Tax Court, were from a cold record and not based on seeing or hearing the witnesses. Therefore, the petitioners were deprived of their right to a fair trial.

The said appellate court in its present decision creates a conflict therefore with the Supreme Court of the United States, *United States v. Yellow Cab Company*, 338 U. S. 338-344, and also creates a conflict therefore with other Courts of Appeals as to the use of Rule 52(a). *Seagrave Corp. vs. Mount*, 212 F. 2nd 389; *Iravani Mottageni v. Barlsey Importing Co.*, 244 F. 2nd 238; *Steiner v. Mitchell*, 215 F. 2nd 171; *Pacific Vegetable Oil Corp. v. Commissioner of Internal Revenue*, 251 F. 2nd 682.

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* See comment
Note 111 A. L. R. 742, Annotation in 49 L. Ed. 546

It is important to the public at large that this Court at this time clarify and set forth, the correct interpretation of this Rule 52(a) so that the appellate courts will be compelled to follow said interpretation particularly respecting the nebulous field of fraud in tax matters.

The decision of the appellate court as it now stands is nothing more or less than a subtle erosion of the common legal principles of evidence and should be rectified by this Court.

The decision of the United States Court of Appeals for the Third Circuit in refusing to order the Tax Court to give petitioners a new trial so that the trial judge could have the opportunity of actually seeing and hearing the witnesses themselves, has in effect violated the due process clause of the Fifth Amendment to the Constitution. The petitioners have not had their day in court in light and in view of the fact that their intent as to fraud could not be and should not be judged as to credibility by one who did not have the opportunity to observe their demeanor or reactions while testifying. The application of Rule 52(a) by the Court of Appeals for the Third Circuit in its decision thus by logical legal deduction has violated the rights of the petitioners under the due process clause of the Fifth Amendment and they did not receive a fair and impartial trial.

It is further contended that when the Tax Court found that the question of credibility was greatly involved in this instant case, it should have ordered a new trial.

The taxpayer wife, Josephine Shahadi, has been held liable for the tax and fraud penalty deficiencies for the year 1950 because she signed a joint return for that year. It is argued that she cannot be held liable for the additional fraud penalty in the absence of proof of fraud on her part. (Section 51(b) Internal Revenue Code of 1939.)

Circuit Court Judge Kalodner (3rd Circuit) states, inter alia, in his dissenting opinion in the case of *Kann v. Commissioner*, 210 F. 2nd 255,

> ". . . the view which I have expressed makes it unnecessary to discuss the issues as to (1) Whether Stella

H. Kann filed a joint income tax return with her husband W. L. Kann for the years 1937 and 1938 and (2) whether Stella H. Kann, for either of such years, she is liable for a fraud penalty. I should like to note, however, that I am of the opinion that the returns were not joint and even if they were that there is no liability on the part of Mrs. Kann for a fraud penalty since the government failed to discharge its affirmative evidence of proof with respect to any fraudulent intent on her part to evade tax."

The Commissioner in the instant case did not produce any proof of fraud on the part of Mrs. Shahadi and the Tax Court has not found any express finding of fraud on her part. It is therefore contended that this is a taking of her property in violation of her rights accorded her under the due process clause of the Fifth Amendment to the Constitution of the United States.

**B. Argument amplifying reason No. 6 relied on for the allowance of the writ.**

The United States Court of Appeals for the Third Circuit in affirming the opinions of the Tax Court in the instant case has created a conflict with this Court's opinions in the case of *United States v. Massei*, 355 U. S. 595; *Holland v. United States*, 348 U. S. 121.

The area of conflict arises as a result of the misinterpretation of this Court's consideration of necessary proof for fraud in a net worth income tax case. Both the said appellate court and the Tax Court below are of the opinion that in all net worth cases the Commissioner of Internal Revenue does not have to prove a likely source of income. All he has to do is to negate the possible sources of the unreported increases of net worth of all those non-taxable sources indicated by the petitioner.

Petitioners contend that this Court did not so hold either in the *Massei* or *Holland* cases, supra, respecting all net worth cases, and that the burden for the proof of fraud under any circumstances can never be shifted from the Commissioner to the taxpayer, as would be the result if this instant decision should stand. To permit this decision to stand would be in direct conflict with 26 U. S. C. Section 1112 which clearly states that the burden for the proof of fraud must always be upon the Commissioner. In the instant case the Commissioner could show no unreported sources of taxable income nor additional unreported income from petitioner's law practice or public office held by him. Petitioners urge that it is necessary that this Court clarify this decision with respect to the measuring rod set up in the *Massei* case, supra, otherwise there will be a continued conflict respecting proof of fraud in income tax cases hereafter involving net worth. Also as to the proof required to accurately determine the opening cash on hand.

It is further urged that the trial Court and appellate Court disregarded the principle that each year is a separate taxable unit and did not consider the allowance of any cash on hand for any of the years involved. Where the issue is fraud we cannot assume that such fraud occurred in each of the years in issue rather than solely in one.

It is to be noted that petitioner Albert N. Shahadi paid out $8250 in cash in January, 1945, which he could have had at the beginning of that year.

## CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons the petition for a writ of Certiorari should be granted by this Honorable Court.

GEORGE P. WALKER,
ROBERT M. TAYLOR,
*Attorneys for Petitioners.*

## APPENDIX.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

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No. 12,802.

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ALBERT N. SHAHADI,
*Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

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No. 12,803.

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ALBERT N. SHAHADI,
*Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

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No. 12,804.

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ALBERT N. SHAHADI and JOSEPHINE SHAHADI,
*Petitioners,*
v.
COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

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APPEAL FROM THE TAX COURT OF THE UNITED STATES.

Argued March 17, 1959

Before: McLAUGHLIN and HASTIE, Circuit Judges, and MORRILL, District Judge.

## OPINION OF THE COURT

(Filed April 16, 1959.)

By MORRILL, District Judge:

Tax deficiencies, fraud penalties and underestimation penalties were assessed against petitioner Albert N. Shahadi for the years 1944-1949 inclusive and against him and his wife, Josephine, for the year 1950. Appeals heard by the Tax Court as a consolidated group resulted in the Commissioner being sustained and the petitioners are now before us in a consolidated review after a denial by the Tax Court of their motion for reconsideration.

The deficiencies and additions amounted to $74,599.29 as follows:

| | | *Additions to Tax* | |
|---|---|---|---|
| | | *Sec. 293(b)* | *Sec. 294(d)* |
| *Year* | *Deficiency* | *(Fraud)* | *(Underestimation)* |
| 1944 | $ 4,472.04 | $2,236.02 | $ None |
| 1945 | 9,757.73 | 4,878.87 | 658.98 |
| 1946 | 7,052.82 | 3,526.41 | 423.17 |
| 1947 | 4,679.09 | 2,339.55 | 210.77 |
| 1948 | 5,464.99 | 2,732.50 | 341.21 |
| 1949 | 15,005.87 | 7,502.94 | 974.97 |
| 1950 (Joint) | 1,461.34 | 730.67 | 86.51 |
| 1951 (Joint) | None | None | 62.84 |

On the basis of a net worth computation, it was found that there was a failure to report income during 1944-1950 inclusive in the amount of $102,277.74.

The principal questions are: Was the use of the net worth method justified under §41[1] of the Internal Revenue Code of 1939?[2] Did the evidence justify the finding of deficiencies? Were the deficiencies due to "fraud with intent to evade tax" under §293(b) of the Code?[3] Were there false or fraudulent returns with intent to evade with reference to the years 1944-1947 so that under §276(a) the limitations statute was rendered inapplicable? Was there substantial underestimation of taxes to justify invoking the additions imposed under §294(d)(2)? Was there error in denying petitioners' motion for rehearing?

Admitted to practice in New Jersey in 1923, the husband petitioner worked in a law office for about five years, receiving a salary of $25-$50 per week plus what he made on his own cases. During the period 1938-1951, the petitioner conducted his own law practice and additionally held certain appointive positions as follows:

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[1] §41 I.R.C. "The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if * * * the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income * * *."

[2] All Code references are to the Internal Revenue Code of 1939, 26 U.S.C.

[3] §293(b) I.R.C. "If any part of any deficiency is due to fraud with intent to evade tax then 50 per centum * * * shall be assessed * * *."

| *Year* | *Position* | *Salary* |
|---|---|---|
| 1938 | Recorder | $2,080.00 |
| 1939 | Recorder | 4,260.00 |
| 1940 | Recorder | 4,500.00 |
| 1941 | Recorder | 4,500.00 |
| 1942 | Recorder | 4,574.88 |
| 1943 | Recorder | 4,699.84 |
| 1944 | Recorder and Commissioner | 5,006.19 |
| 1945 | Commissioner | 5,250.00 |
| 1946 | Commissioner | 5,250.00 |
| 1947 | Commissioner | 5,250.00 |
| 1948 | Commissioner | 5,250.00 |
| 1949 | Commissioner | 5,250.00 |
| 1950 | Commissioner | 1,312.50 |
| 1950 | County Solicitor | 5,312.00 |
| 1951 | County Solicitor | 7,900.00 |

In his private practice he was associated with one Miller who did petitioner's trial work for which Miller received a portion of petitioner's legal fees. Only the net fees thus received by petitioner were recorded in his books and reported as income.

When revenue agents first interviewed petitioner in 1951, he could produce no books or records for the years through 1948 save certain checks issued in 1948. The other records had been destroyed "because I thought I would never have any use for them." He did have a form for the next three years ledger sheets which assertedly reflected his income and expenditures, he having "figured from what I understood that that was sufficient to keep." Cancelled checks were also available. The agents found petitioner's subsidiary files incomplete and lacking in substantiation as to income and expenditures for the years 1949 and 1950; and his bank deposits for the years 1946-1948 inclusive showed deposits in excess of reported gross income. When confronted with this state of affairs, petitioner suggested

that the discrepancies might be attributed to his financial arrangement with Miller, but a subsequent examination of Miller's records contributed not a bit toward the resolution of the problem. The net worth and expenditures method of reconstructing income was thereupon adopted by the agents.

For trial purposes a stipulation was entered into with respect to petitioners' assets, liabilities, living expenses, net worth, and annual increase in net worth plus living expenses as of 31 December 1943 and as of 31 December of each taxable year from 1944 through 1950. Exceptions and reservations to the stipulation were noted by petitioners, these pertaining to an item of furs and jewelry and an item of cash. As to the first item, petitioners contended that these assets were received during the net worth period as gifts from Mrs. Shahadi's mother; as to the second item, the right was reserved to submit evidence concerning the amount of cash on hand as of 31 December 1943 and throughout the subsequent years. A condensation of the stipulation, plus the amounts of adjusted gross income the petitioners reported on their returns for the years 1944 through 1950, and the total unreported income as determined by the respondent, is marked Appendix I.

The value of the furs appears in the net worth statement as follows:

| | |
|---|---|
| 31 December 1944 | $2,010.00 |
| 31 December 1945 | " |
| 31 December 1946 | " |
| 31 December 1947 | 7,530.00 |
| 31 December 1948 | " |
| 31 December 1949 | 11,530.00 |
| 31 December 1950 | 12,825.00 |

The gifts of jewelry and furs are alleged to have been made in 1944, 1947, 1950 and 1951. In an affidavit petitioner Josephine Shahadi had stated that her mother had given her a fox jacket and a neckpiece of three baum marten skins;

In testifying later before the Tax Court, she admitted the falsity of this statement and testified that she had purchased the two items herself. As to the other items of furs and jewelry, she said her mother gave them to her, but her proof in this regard was insubstantial and the court may well have disbelieved her on *falsus in uno, falsus in toto.*

As to the reservation about cash, petitioner Albert Shahadi told the agents in 1951 that he had a cash hoard[4] in a safe deposit box, which represented savings of many years, but he did not disclose the amount. At the end of 1952, he told the agents he had accumulated $70,000 in cash in the deposit box derived from the following sources: $30,000 in cash from his mother in December 1924 or January 1925; $20,000 in cash from his father late in 1931; and $20,000 in cash from earnings, gifts and inheritances over a period of years prior to 1944. He complains about the net worth computation and the determined deficiencies in that the computation failed to take into account this accumulation of cash prior to 31 December 1943.

As to the cash hoard of $70,000, the Tax Court found "utterly incredible". He claimed a $30,000 cash gift from his mother, Mary, in December 1924 or January 1925. She never filed a tax return. She died in March 1927, possessed of personal property in the amount of $300 and real property in the amount of $4,000. Her son, the petitioner here, was her executor. Her husband, in Europe in 1914, was interned there during World War I until 1920. Mary sent him money during that period. She also supported a Mrs. Saseen and her six children at least through 1920, after Mr. Saseen had deserted them. This support included college expenses for two years for one of the Saseen children, and expenses for the petitioner for about one and a half years at the same college. In May 1923,

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[4] The existence of a substantial amount of cash on hand at the starting point of the net worth figures is a "favorite defense" **Holland v. United States,** 348 U.S. 121, 127, **Schwarzkopf v. Commissioner,** 246 F.2d 731, 734 (3 Cir.)

she purchased a house for about $10,000 subject to a $4,000 mortgage on which she paid interest at the rate of 6% per annum. These facts alone repel a belief that in December 1924, she had a $30,000 cash hoard to give to her son.

The cash gift of $20,000 was allegedly made late in 1931 by his father, Nicola, who was adjudicated a bankrupt on 15 April 1929, his schedules showing stock in trade valued at $564.05 and cash in two banks totalling $24.82. Between the date of the father's discharge in bankruptcy in August 1929 and the date of the cash gift, business conditions in this country were not favorable for the rapid accumulation of money, to say the least. The father died in November 1947 and his son, the petitioner, was his executor. The petitioner advised the State Transfer Inheritance Tax Bureau, in writing, that the decedent had not made any transfer without full consideration of a material part of his estate more than two years prior to death. Nicola was also delinquent in his federal income tax returns, none having been filed 1913-1926 inclusive, 1929 and 1931-1947 inclusive. It would require a great deal of credulity to put stock in the claim that the father had made this large gift at the time designated.

But there are other facts that compel a rejection of the cash hoard story. Within a few weeks prior to the bankruptcy, the father borrowed $725 on a life insurance policy. Petitioner was a tax delinquent, on the realty inherited from his mother, for seven years between 1928-1937. In 1944, the petitioner purchased certain stocks and bonds for $5,500, borrowing $3,500 for this purpose, and the next month sold some of his United States Savings Bonds to repay the loan. In January 1945, he bought $10,000 worth of bonds for which he paid $8,250 in cash and the balance by check and in 1948, he bought a house for about $28,000, paying $1,000 by check, $15,000 by mortgage and balance by cash; all the cash reputedly coming from the hoard. In September 1945, he bought $10,000 worth of stock of a finance company, using about $5,600 in currency toward payment, this cash, too, coming from the hoard allegedly.

Because he was in politics, petitioner kept the money in a bank vault, avoiding normal bank deposits in his town because anyone could easily find out how much he had on deposit,—this from an attorney, who quite naively did not realize that out-of-town banks would have accommodated him as to deposits and privacy.

This being a civil action, the determinations of the Commissioner have *prima facie* validity. *Holland v. United States*, 348 U. S. 121, 126. The petitioners have the burden of overcoming the presumption that the Commissioner's determinations were correct. *Goldberg v. Commissioner*, 239 F. 2d 316 (5 Cir.); *Kashat v. Commissioner*, 229 F. 2d 282 (6 Cir.); *Halle v. Commissioner*, 175 F. 2d 500 (2 Cir.).

The petitioners' records were so inadequate and the subsidiary records were so devoid of exculpatory assistance that the Commissioner had little choice but to resort to the net worth method under §41. This section was not intended to make a set of blinders which prevents the Government from looking beyond the self-serving declarations of a taxpayer's books. *Holland v. United States, supra* @ 132.

Under the technique used, the establishment of an opening net worth with reasonable certainty was essential. Here the opening net worth was established at $28,067.12. Save for the items of jewelry and furs and cash, this was stipulated to by the parties. The items have been previously adverted to. The petitioners' proof as to the furs and jewelry were so vague and indefinite as to the actuality and dates of the gifts, and so incredible as to the cash hoard, that we find nothing therein sufficient to disturb the opening figure. The leads given to the Government—Miller and the cash hoard—were investigated and the results of the investigation do not negate our conclusion. The fact that the Commissioner did not directly contradict petitioners' self-serving declarations would not compel the Tax Court to accept the declarations in the circumstances of this case, and it was eminently proper to use the net-worth method here. *Schwarzkopf v. Commissioner*, 246 F. 2d 731, 734 (3

Cir.). The determinations of the Commissioner and of the Tax Court in this regard appear to be rational and fair rather than speculative and arbitrary and therefore will not be disturbed. *Goe v. Commissioner*, 198 F. 2d 851 (3 Cir.).

The total unreported income for the periods in question was $102,277.74—disregarding the items just mentioned. (If these items were allowed, there would still be unreported income of $19,452.74.) The only disclosed sources of income were from the practice of law and salaried office holdings, both being taxable income and constituting likely sources from which the Commissioner and the Tax Court could reasonably find the net worth increases sprang. There was proof that over the period in question, the increases in net worth plus the expenditures exceeded the available declared resources. This justified the finding that there was unreported income attributable to earnings. *United States v. Johnson*, 319 U. S. 503, 517. There is no need to negative all the possible non-taxable sources of net worth increases. *United States v. Massei*, 355 U. S. 595.

Fraud is never presumed[5] but must be established by clear and convincing evidence. *Valetti v. Commissioner*, 260 F. 2d 185, 188 (3 Cir.); *Commissioner v. Rubinstein*, — F. 2d — (3 Cir. March 17, 1959). But the consistent failure to report substantial amounts of income over a number of years, standing alone, is effective evidence of fraudulent intent. *Schwarzkopf v. Commissioner*, 246 F. 2d 731, 734 (3 Cir.). A consistent pattern of under-reporting large amounts of income may support an inference of willfulness. *Holland v. United States*, *supra*, @ 139; *Smith v. United States*, 348 U. S. 147, 157. On the whole case, the highlights of which have been recited here, there was ample evidence that the taxpayer acted fraudulently with intent to evade taxes. *Goe v. Commissioner*, 198 F. 2d 851

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[5] §1112 I.R.C. "* * * the burden of proof in respect of such issue shall be upon the Commissioner * * *"

(3 Cir.). In the *Rubinstein* case, *supra*, the Tax Court concluded that the Commissioner had not carried his burden of proving that a fraudulent return had been filed so as to avoid the statute of limitations, and this court's comment on that conclusion, adapted to the conclusion in the case at bar, is apt here: The case, therefore, involves simply the weighing of the evidence used to reach a conclusion. The conclusion that the evidence was strong enough to establish fraud is perhaps not the only possible conclusion that could have been drawn from what was before the court. But the conclusion is sustained by enough evidence so that we cannot say, which we must to reverse, that the finding was clearly erroneous.

This fraud with intent to evade tax justified the imposition of penalties under §293(b) of the Code. The statute of limitations is also avoided because the exception in §276(a)[6] is brought into play by the same fraud.

The underestimation question was not specifically argued by petitioners. In any event, if the net worth computation is valid as to deficiencies and fraud penalties, it is valid as to underestimation.

In the Tax Court the case was heard by Judge Rice who heard all the testimony but died before he could write his opinion. The case was then assigned to Judge Van Fossan who made his findings and wrote his opinion from the record and the briefs filed with him. The parties were given notice they might request a rehearing or reargument but neither party made such request. It is now argued by counsel for petitioners that the trial judge had made certain side-bar comments in connection with the item of jewelry and furs that were favorable to the petitioners and that counsel thought this "transaction" was recorded in the judge's notes which would be used by the opinion writing judge but which, alas, were not so used. The explana-

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[6] §276(a) I.R.C. "In the case of a false or fraudulent return with intent to evade tax * * * the tax may be assessed, or a proceeding in Court for the collection of such tax may be begun without assessment at any time."

tion for not moving for a rehearing when the opportunity was offered is that "In light and in view of the fact that Counsel for the petitioners were under the impression that there was in existence the memoranda and notes of the departed Judge, they did not at that time request a new trial, feeling assured that Judge Rice's notes and memoranda would be adhered to concerning the credibility of the testimony of the petitioner and his wife." Of course, there is nothing to indicate what the judge's notes contained on this item or that he even made notes on it. Petitioners intentionally relinquished their right to move for a rehearing—a true waiver—on a gamble, the gamble that Judge Rice made favorable notes which Judge Van Fossan would follow. Having lost the gamble, they then moved for a rehearing and the motion was denied. In our opinion, the denial was obviously just; to hold otherwise would convert trials into games of chance. "There is no reversible error here because one judge of the Tax Court * * * heard the case and another judge * * * wrote the opinion." *Halle v. Commissioner*, 175 F. 2d 500 (2 Cir.).

The decision of the Tax Court will be affirmed.

APPENDIX I

| | Year Ended 12-31-43 | Year Ended 12-31-44 | Year Ended 12-31-45 | Year Ended 12-31-46 | Year Ended 12-31-47 | Year Ended 12-31-48 | Year Ended 12-31-49 | Year Ended 12-31-50 |
|---|---|---|---|---|---|---|---|---|
| Net worth at end of year | $28,067.12 | $35,986.95 | $54,210.13 | $64,757.89 | $66,756.06 | $79,752.38 | $111,871.24 | $122,755.65 |
| Net worth at beginning of year | | 28,067.12 | 35,986.95 | 54,210.13 | 64,757.89 | 66,756.06 | 79,752.38 | 111,871.24 |
| Increase in Net Worth | | $ 7,919.83 | $18,223.18 | $10,547.76 | $ 1,998.17 | $12,996.32 | $ 32,118.86 | $ 10,884.41 |
| Add: personal expenditures less allowable deductions and non-taxable income | | 10,040.90 | 10,684.87 | 21,920.29 | 17,745.90 | 9,715.21 | 11,111.24 | 11,499.95 |
| Increase in net worth plus personal expenditures: reconstructed adjusted gross income | | $17,960.73 | $28,908.05 | $32,468.05 | $19,744.07 | $22,711.53 | $ 43,230.10 | $ 22,384.36 |
| Reported adjusted gross income | | 7,197.08 | 10,790.54 | 19,863.93 | 7,646.65 | 8,489.80 | 13,607.56 | 17,382.85 |
| Total unreported income | | $10,763.65 | $18,117.51 | $12,604.12 | $12,097.42 | $14,221.73 | $ 29,622.54 | $ 5,001.51 |
| | | | | 77.40* | | (151.02)* | (165.53)* | 88.41* |
| | | | | $12,681.52 | | $14,070.71 | $ 29,457.01 | $ 5,089.92 |

* Stipulated adjustments

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

---

No. 12,802.

---

ALBERT N. SHAHADI,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

---

(Tax Court No. 49197.)

---

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Present: McLAUGHLIN and HASTIE, Circuit Judges, and MORRILL, District Judge.

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JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, ad-

judged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

April 16, 1959.

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UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

---

No. 12,803.

---

ALBERT N. SHAHADI.
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

---

(Tax Court No. 52841.)

---

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

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Present: McLAUGHLIN and HASTIE, Circuit Judges, and MORRILL, District Judge.

---

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

April 16, 1959.

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UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

---

No. 12,804.

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ALBERT N. SHAHADI and JOSEPHINE SHAHADI,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

---

(Tax Court 52842.)

---

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

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Present: McLAUGHLIN and HASTIE, Circuit Judges, and MORRILL, District Judge.

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JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, ad-

judged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk

April 16, 1959.

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PETITION FOR REARGUMENT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The petition of the above named petitioners, by their Counsel, GEORGE P. WALKER, Esq., and ROBERT M. TAYLOR, Esq., pray this Honorable Court for a reargument in the above entitled consolidated cases from its opinion filed April 16, 1959, for the reasons hereinafter set forth.

1. This Court, in its opinion on page 9, discusses at length the question of fraud with intent to evade tax as is set forth under Section 293(b) of the Internal Revenue Code of 1939. This Honorable Court, in its prior dissertations as to the findings of facts as made by the Tax Court concluded that the petitioner, Albert N. Shahadi, could have earned the increases of net worth from his practice at law and salaried office holdings. This finding of fact, although not having been made an actual finding of fact by the Tax Court, but merely having been alluded to as a weak possibility, has now been incorporated in this opinion as an actual finding of fact despite the preponderance of evidence to the contrary. For the purposes of the presumption of correctness of the Commissioner's assessments, this conclusion could only rest for its basis on inference and conjecture and if it were concluded by the Court that the petitioners had not by sufficient evidence overcome the presumption of correctness,

this conclusion of earned income based on conjecture, suspicion and inference might, in law, become a sustainable one. However, most certainly, it could never become the basis for *clear and convincing* proof necessary for the establishing of fraud, as is set forth under the Internal Revenue Code.

It must be conceded at this point that there was not a scintilla of any evidence adduced at the trial below of an independent and direct nature which is necessary, in addition to other facts, for the proof of fraud. To the contrary it is an admitted fact that the petitioner, Albert N. Shahadi, did not set up any practices of chicanery, methods and manners of concealment, schemes of fraud and the like, which usually occurs in an intent to evade the payment of taxes. Rather, the intent is to the contrary, the evidence clearly indicating full cooperation with the agents of the Commissioner, a complete acquittal from an indictment charging him with fraud, and the failure of the Commissioner to prove any single omission or the failure of the petitioner to report his earned income. All of the above is respectfully submitted to this Honorable Court to show that the conclusion of fraud in this case could only be reached as a result of a "feeling" which could only be based upon the presumption and suspicion, conjecture and inferences. This being so, legally, the evidence could never reach the height of proof necessary for it to be clear and convincing.

We respectfully call this Court's attention to the fact that as to the petitioner, Josephine Shahadi, most certainly there could be not sustained against her a finding of fraud because the burden of proof of fraud cannot be met by mere imputation.

The evidence as testified to by the petitioner, Josephine Shahadi, could never have been resolved on the theory of "Falsus im Uno, Falsus im toto", because it is well recognized that in order to impose such a rule of evidence, the testimony as alluded to as false must be material and rele-

vant. In this instant case the evidence clearly shows that although petitioner, Josephine Shahadi, made a mistake in her affidavit respecting certain furs, the only difference in her statement being that of having received these furs as gifts from her mother when in fact she herself purchased said furs with her own money as proven at the trial by her own checks. The result being that in either event the petitioner, Albert N. Shahadi, most certainly did not purchase said furs; therefore these items could not have any materiality or relevancy to the net worth.

"Evidence to be clear and convincing must be such that there is no serious or substantial doubt as to the correctness of the conclusion."

*Northcrest, Inc. v. Walker Bank and Trust Co.* (Utah), 248 P. 2nd 692, 698;

*Greever v. Greever* (Utah), 212 P. 2nd 184, 205.

"Clear and convincing evidence means more than a mere preponderance of the evidence."

*State v. Cale*, 19 N. J. Super. 397, 88 A. 2nd 529, 531.

"For evidence to be clear and convincing to a particular mind, it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion."

*Kirchgestner v. Denver & R. G. W. R. Co.*, 233 P. 2nd 699, 700.

"Clear and convincing evidence is that evidence which is so clear, explicit and unequivocal as to leave no substantial doubt and which is sufficiently strong to command the unhesitating assent of every reasonable man."

*Petition of Jost*, 256 P. 2nd 71, 74; 117 C. A. 2nd 379;

*Cross v. Ledford*, 120 N. E. 2nd 118, 123; 161 Ohio St. 469.

"'Clear' means plain, evident, obvious, free from doubt or conjecture beyond reasonable doubt or conjecture."

*Richard v. Western Fire Ins. Co.*, D. C. Minn., 161 F. Supp. 115, 118;
*Paul W. Weir*, 17 T. C. M. 795;
*Crockett v. United States*, 2 S. F. & R. 2nd 5115;
*Allison Jones v. Commissioner*, 259 F. 2nd 300.

2. This Honorable Court in its final analysis regarding the question of fraud concluded as follows, on page 9 of its Opinion: "The conclusion that the evidence was strong enough to establish fraud is perhaps not the only possible conclusion that could have been drawn from what was before the Court. But the conclusion is sustained by enough evidence so that we cannot say, which we must to reverse, that the finding was *clearly erroneous*. (Emphasis our own.)

We urge that this Honorable Court can find and should find that, particularly as to fraud, the Court below was in error because of the conceded possibility of more than one conclusion being drawn from the evidence on hand. This is so because this Honorable Court conceding, and correctly so, that another conclusion could have been drawn from the evidence before the Court below, that this situation must clearly violate the test for the establishment of clear and convincing proof under Rule 52(a) of the Federal Rules of Civil Procedure; said Rule providing,

> "Effect. In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.
>
> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the oppor-

tunity of the trial court to judge of the credibility of the witnesses' * * *"

More particularly the legal test applied to the phraseology "Clear and Convincing" which we respectfully submit to this Court as meaning that height of proof which rises higher than preponderance and slightly lower than beyond a reasonable doubt could and could only be adhered to, if, and when, a trier of the facts has had the opportunity to personally observe and hear the witnesses as required under the rule; all of which the Court below did not do.

The greater weight of legal precedents for the affirmance of the above interpretation of Rule 52 (a) corroborates the contentions of the petitioners. To conclude otherwise, would run contrary to all legal logic for if in fact more than one conclusion can be drawn, as in this case, from evidence on hand, certainly that evidence could never be clear and convincing.

Therefore, this Court could and should find that the Trial Court was in error as to its findings of fraud because it could not use a test of relying upon one conclusion rather than a possible contrary conclusion as being sufficient to meet the requirements of clear and convincing evidence necessary for proof of fraud. In addition, not having had the opportunity to personally observe and hear the witnesses, so that a more correct and certain conclusion could be drawn, the Court below most certainly violated what is necessary under Rule 52(a).

At this point we stress the additional fact of the wrong finding of fraud when we add to the above, the fact that the petitioner, Albert N. Shahadi, had been acquitted of a charge of fraud under an indictment covering the same and identical facts as in this civil case. This should have added to and been persuasive for a conclusion of no fraud.

It is most interesting to note at this moment that were the results of the indictment that of a finding of "guilty", this legal conclusion would have been recognized as one of

the major and basic tests of meeting the requirements for clear and convincing proof of fraud. We say that this being so, the reverse is true when there is an acquittal under an indictment of fraud.

*United States v. DuPont DeNemours & Co.*, 353 U. S. 646; 1 Led 1057, 77 S. Ct. 872;
*Smith v. Dental Products Co., Inc.*, 168 F. 2nd 516.
*United States v. Yellow Cab Co.*, 338 U. S. 341;
*United States v. E. I. DuPont DeNemours Co.*, 351 U. S. 381.

## CONCLUSION.

For the foregoing Reasons, it is respectfully submitted that this petition for reargument be granted.

GEORGE P. WALKER,
ROBERT M. TAYLOR,
Attorneys for Petitioners-Appellants.

## CERTIFICATE OF COUNSEL.

WE HEREBY CERTIFY that this petition for a reargument is presented in good faith and not for delay.

GEORGE P. WALKER,
ROBERT M. TAYLOR,

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 282

ALBERT N. SHAHADI and JOSEPHINE SHAHADI,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case involves the related decisions of the Tax Court (29 T.C. 1157), upheld by the Court of Appeals (266 F.2d 495), imposing liability on the taxpayer, Albert N. Shahadi, for deficiencies in income tax, and additions thereto for fraudulent understatement of income, for the years 1944 through 1949, and on the taxpayer and his wife, Josephine Shahadi, for the year 1950 when they filed a joint return, amounting to a total of $74,536.45. (Pet. 25.)

The case was heard in the Tax Court by Judge Rice, who died before writing an opinion. The case was then assigned to Judge Van Fossan who gave the parties notice that they might request a rehearing or reargument. Neither party made such request, and Judge Van Fossan thereupon made his findings (R. 302a-314a), and wrote his opinion (R. 314a-320a) from the record and the brief filed with him. (Pet. 33.)

The facts, upon which the decisions rest, are set forth in detail and evaluated in the opinion of the Court of Appeals. (Pet. 25-36). It appears from these facts that the taxpayer, a practicing attorney since 1923 (Pet. 26), kept incomplete records of his income, and that his bank deposits for the years 1946-1948, inclusive, showed deposits in excess of reported gross income. (Pet. 27.) Since the taxpayer's explanation of the discrepancy was inadequate, the net worth method of reconstructing income was adopted (Pet. 28), which showed unreported income for the seven years in question, totalling $102,277.74. (Pet. 32, 35.) The taxpayers concede the use of the net worth method of reconstructing their income, but claim that the net worth statement is incorrect on the grounds that it fails to include a cash hoard of $70,000 accumulated prior to December 31, 1943, and includes furs valued at $33,895 and some jewelry allegedly given to Mrs. Shahadi by her mother. (Pet. 28, 29.)

The claim that the furs were a gift rested upon Mrs. Shahadi's testimony, which was contradictory and insubstantial. The claim to a cash hoard rested

entirely upon the taxpayer's assertion that he received a gift of $30,000 in cash from his mother in December 1924, or January 1925; another gift of $20,000 from his father late in 1931; and that he accumulated $20,000 more in cash from earnings, gifts, and inheritances over a period of years prior to 1941. (Pet. 29.) According to the taxpayer, he kept the cash in a safe-deposit box, because he did not trust the secrecy of normal bank deposits in local banks. (Pet. 31.)

The undisputed record facts belied the claim to a cash hoard. The taxpayer's mother never filed a tax return. She died in 1927 leaving a $4,300 estate, and for a number of years she supported a Mrs. Saseen and six children, besides her own family. In 1923, she purchased a $10,000 home, subject to a $4,000 mortgage at six percent interest. (Pet. 29-30.)

The taxpayer's father, who allegedly made a gift to him of $20,000 late in 1931, was adjudicated a bankrupt in 1929, filed no tax return for most of the period, and died in 1947. The taxpayer, as executor of his father's estate, advised the State Transfer Inheritance Tax Bureau, in writing, that the decedent had not made any transfers of a material part of his estate without consideration more than two years before his death. (Pet. 30.)

The taxpayer himself, during the period of the alleged cash hoard, was a tax delinquent on the family home inherited from his mother, and borrowed $3,500 to purchase certain stocks and cashed savings bonds to repay the loan. (Pet. 30.)

On these facts, the Court of Appeals concluded that the taxpayer's claim to a cash hoard was "incredible." (Pet. 31.) It further held that the determinations of the Commissioner and the Tax Court were "rational and fair," and that there was proof of "unreported income attributable to earnings." On the issue of fraud, the Court concluded that "On the whole case, * * * there was ample evidence that the taxpayer acted fraudulently with intent to evade taxes." (Pet. 32.) It went on to rule that the case involved the weighing of the evidence and that the conclusion reached by the Tax Court was sustained by enough evidence so that it was not clearly erroneous. (Pet. 33.)

The taxpayers' principal claim for review here is that the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure was not applicable upon appellate review, since the case was decided in the Tax Court on a stipulated record, and therefore the taxpayers are entitled to a new trial in the Tax Court, where the credibility of their claim to a cash hoard and gifts of furs and jewelry can be tested by their demeanor. (Pet. 19-21.) This contention is without merit, since the court below has not relied exclusively upon the clearly erroneous rule but has itself evaluated the evidence and found that there was "ample evidence" of fraud. (Pet. 32.) See *Steiner* v. *Mitchell*, 215 F. 2d 171 (C.A. 6th). Moreover, the taxpayers were at most entitled to an evaluation of the evidence by the Court of Appeals, which it performed, not to a new trial in the Tax Court. In view of their waiver of any rehearing in the Tax

Court, the contention of a denial of due process is frivolous. (Pet. 33-34.) And, in the face of the undisputed record facts as to the financial situation of the alleged donors and of the taxpayer himself, the claim to a distant, but vanished, cash hoard presents no issue of credibility. Cf. *Holland* v. *United States*, 348 U.S. 121, 132-136; *Friedberg* v. *United States*, 348 U.S. 142, 144; *Smith* v. *United States*, 348 U.S. 147, 157-158.

The taxpayers' other contentions are also without merit. It is settled that a wife who signs a joint return is liable for fraud, notwithstanding the absence of proof of fraud on her part. *Furnish* v. *Commissioner*, 262 F. 2d 727 (C.A. 9th); *Kann* v. *Commissioner*, 210 F. 2d 247 (C.A. 3d), certiorari denied, 347 U.S. 967; *Howell* v. *Commissioner*, 175 F. 2d 240 (C.A. 6th). There is no conflict with *United States* v. *Massei*, 355 U.S. 595, and *Holland* v. *United States*, 348 U.S. 121 (cf. Pet. 22-23). On the contrary, the decision below is in accord with the rule of those cases that fraud is proved by negating the taxpayer's claim to sources of nontaxable income, where, as here, unreported income is attributable to taxable earnings. (Pet. 32.) See also *Commissioner* v. *Thomas*, 261 F. 2d 643 (C.A. 1st).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER, 1959.

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